Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 560.

THE UNITED STATES, APPELLANT,

vs.

FRANK Y. ANDERSON AND WILLIAM J. CAMERON, TRUSTEES, AND THE ALABAMA STATE LAND COMPANY,
APPELLEES.

Appeal from the Court of Claims.

BRIEF FOR THE APPELLEES.

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Statement of the Case.

The appeal in this case is taken from the judgment of the Court of Claims, which awarded to the defendants in error a judgment for the sum of $15,000, for money received by the United States from certain trespassers for iron and limestone which they had illegally taken from lands, the title to which is owned in fee simple by the appellees.

The material facts in the case are these:

By Act approved June 3, 1856, Congress made, amongst others, a grant of lands to the State of Alabama of six

odd-numbered sections per mile, and lying within six sections in width on each side of the railroad, to aid in the construction of a railroad designated in section six of said Act as "the Northeast and Southwestern Railroad, "from near Gadsden to some point on the Alabama and "Mississippi State line, in the direction to the Mobile and "Ohio Railroad, and with a view to connect with said "Mobile and Ohio Railroad," and the same section of said law authorized the State of Alabama to designate the railroad to which said lands should be assigned. (11 Statutes, p. 17; Record, p. 7.)

The Act of June 3, 1856, required the construction and completion of the railroad within ten years under penalty of forfeiture of the grant, but the time for the construction of the road was extended by an Act of Congress approved April 10, 1869, for the period of three years from and after that date. (16 Statutes, p. 45.)

By section 1 of said Act of Congress of June 3, 1856, it was provided that where the alternate odd-numbered sections or parts of sections of lands within the six-mile or granted limits of the road had been sold by the United States, or the right of pre-emption had attached to the same at the time the line or route of the road was definitely fixed, "then it shall be lawful for any agent or agents, to be "appointed by the governor of said State, to select from "the lands of the United States nearest to the tiers of "sections above specified, so much land, in alternate sec- "tions, or parts of sections, as shall be equal to such lands "as the United States have sold, or otherwise appropriated, "or to which the rights of pre-emption have attached." The selections so made were required by said Act to be approved by the Secretary of the Interior. (11 Statutes, p. 17.)

The map of definite location of the Northeast and Southwest Alabama Railroad, embracing the lands involved in this action, was filed in the Land Department on No-

vember 29, 1858, and accepted by the Commissioner of the General Land Office on December 1, 1858. (Record, pp. 7, 8.)

Said railroad was constructed and completed within the time required by said Act of June 3, 1856, as amended by the Act of April 10, 1869. (11 Statutes, p. 17; 16 *id.*, p. 45.)

That the official adjustment of this land grant made by the Land Department shows that there was a deficiency of lands in the six-mile or granted limits of the railroad necessary to satisfy the grant of 523,244.87 acres, and that 237,584.05 acres of this deficiency was supplied from the fifteen-mile or indemnity limits of the grant, *and there is now a deficiency of vacant lands necessary to satisfy the grant in full of 285,660.82 acres, and this deficiency has existed since the grant become effective by the definite location of the line or route of the said railroad.* (Record, p. 10, par. 19.)

The record shows that on December 30, 1887, the selecting agent of the State of Alabama made application in due and legal form to select the lands which are involved in this action in part satisfaction of the aforesaid grant to said railroad, at the land office at Huntsville, Alabama, and tendered to the land officers the legal fees and charges payable on said selection, but said officers erroneously and improperly rejected said selection, and an appeal from such action was taken by the agent of the State to the Commissioner of the General Land Office, who on February 25, 1896, reversed the erroneous action of the Huntsville land officers and directed that the selection as presented eight years previously should be allowed; and said selection was allowed by the said local land officers on March 13, 1896, and the Secretary of the Interior approved the same on April 10, 1896. (Record, pp. 9, 10.)

That the governor of Alabama conveyed the said lands to Frank Y. Anderson and William J. Cameron, trustees under the debt settlement Act of February 23, 1876, on April 18, 1896, by proper conveyance, and said Anderson and Cameron, trustees, conveyed them to the Alabama State Land Company by their deed dated January 30, 1899, and the title is now vested in said company, the appellee in this action. (Record, p. 10.)

After the selection of these lands by the agent of the State of Alabama, and between the years 1888 and 1894, the Tennessee Coal, Iron and Railroad Company, the DeBardeleben Coal and Iron Company, and J. W. Worthington and Company went upon said lands with force and arms, and without color of right or title, and mined and removed from the W. ½ of N. W. ¼ of section 27, township 14 south, range 1 west, a large quantity of iron ore of great value, which they converted to their own use; and said parties also went upon the W. ½ of the S. E. ¼ of section 21, township 14 south, range 1 west, and quarried and removed and converted to their own use a large quantity of lime rock of great value. (Record, p. 10.) That the Acting Attorney-General of the United States by letter addressed to C. C. Harvey, vice-president of the Alabama State Land Company, dated August 22, 1896, authorized the trustees of the lands, Anderson and Cameron, to bring suit against said trespassers for the damages committed on said lands by them, in the name of the United States, but this authority was subsequently recalled and suits in the name of the United States were instituted against said parties by the United States Attorney, in the Circuit Court of the United States for the northern district, southern division of Alabama, on February 8, 1897, and damages exceeding the sum of $260,000 were claimed therein by the United States, and these suits were compromised and settled, and a judgment

was entered by the court on November 25, 1898, in which the damages were remitted, it being admitted by the United States Attorney, in open court, that the defendants had paid into the Treasury of the United States the sum of $15,000 in full settlement of all demands under said compromise. (Record, p. 10.)

The Alabama State Land Company consented to the compromise with the depredators upon the payment of the sum of $15,000 into the Treasury of the United States, but claimed the said money, and notified the Attorney General that they would insist on the money being paid over to the Trustees for the benefit of the Alabama State Land Company. (Record, p. 10.)

ARGUMENT.

The land grant under consideration was made by Congress upon certain conditions, precedent and subsequent, which are specified in the grant. As to the lands in the six-mile or granted limits the grant was *in presenti*, and took effect as a present grant upon the filing of the map of the definite location of the road. (Schulenberg *vs.* Harriman, 21 Wallace, p. 44.) The lands which are involved in this case are what is commonly known as indemnity lands, and are located within the common overlapping indemnity limits of the grant to the State of Alabama to aid in the construction of the Northeast and Southwestern Railroad, afterwards known as the Alabama and Chattanooga Railroad, and the railroad known as the South and North Alabama Railroad. (Record, p. 7.)

The South and North Alabama Railroad never made any legal selection or claim to the lands in question, and there is no evidence that there was any deficiency of lands in that grant which would operate to place it on a common

legal level with the Alabama and Chattanooga Railroad grant, in which there was a large deficiency of lands, and said company is not a party to this action, and the fact that the lands involved in this suit were within the common indemnity limits of the two roads is of no importance whatever in the disposition of this case.

On December 30, 1887, the selecting agent of the State of Alabama made application in due and legal form to select the lands involved in this action at the United States land office at Huntsville, Alabama, for and on account of the Alabama and Chattanooga Railroad grant, and tendered to the land officers the legal fees and charges on said selection, and this selection was erroneously and improperly rejected by said officers, and an appeal was taken from their action to the Commissioner of the General Land Office. This legal and valid selection of the lands and the appeal taken by the selecting agent of the State of Alabama was allowed to sleep in the office of the Commissioner of the General Land Office without action for a period of more than eight years, when on February 25, 1896, the Commissioner by his decision sustained the appeal and directed the local land officers to allow the selection, and it was allowed by said officers on March 13, 1886, as originally made. This list of selections was approved by the Secretary of the Interior on April 10, 1896, and such approval was, in legal effect, the same as a patent issued for the land.

Fraser *vs.* O'Connor, 115 U. S., 102;
Williams *vs.* United States, 138 U. S., 514.

It was during this period of wrong, and delay on the part of the land officials, that the trespassers went upon the land and despoiled it of the iron and limestone for which the government received the $15,000 from the trespassers, which is the cause of this action.

In this case, in the selection of the land, the selecting agent of the State performed every legal act which the law required should be performed in order to perfect the title of the Alabama and Chattanooga Railroad to the land, and the legal selection of the land was erroneously and improperly rejected by the local land officers. (Record, p. 9.)

The law applicable to such a state of facts as this was made clear by the decision of this court in the case of Lytle *vs.* Arkansas, in which the record showed that one Nathan Cloyes had made a legal application to make a pre-emption entry for land on which he had made settlement, and the local land officers erroneously and improperly rejected his application and allowed the entry of the land by others.

This court in disposing of that case said:

"It is a well-established principle, that where an individ-
"ual in the prosecution of a right does every thing which
"the law requires him to do, and he fails to attain his
"right by the misconduct or neglect of a public officer,
"the law will protect him."

9 Howard, p. 333.

Not less uncertain is the judgment of this court in the case of Shipley *vs.* Cowan, in which it was said:

"The party who takes the initiatory step in such cases,
"if followed up to patent, is deemed to have acquired the
"better right as against others to the premises. The patent
"which is afterwards issued relates back to the date of the
"initiatory act, and cuts off all intervening claimants.
"Thus, the patent upon a State selection takes effect as
"of the time when the selection is made and reported to
"the land office; and the patent upon a pre-emption settle-
"ment takes effect from the time of settlement as disclosed
"in the declaratory statement or proofs of the settler to
"the register of the local land office."

91 U. S., pp. 330, 337.

It is claimed by the defendants in error that the rights of the Alabama and Chattanooga Railroad to this land were in nowise legally impaired by the wrongful act of the local land officers in rejecting the selection of the land when presented by the agent of the State of Alabama on December 30, 1887, because the Commissioner of the General Land Office by his decision of February 25, 1896, decided that the selection was legal when presented, and this decision being the official action of an official invested by law with powers in their nature judicial, such decision of this question was final, and the selection of the land become thereby a good and valid selection thereof, in law, from the time it was presented at the local land office.

Shipley *et al. vs.* Cowan *et al.*, 91 U. S., 330.

It is true, as a *general rule* of construction, as stated in the brief of the appellant, that the legal title of the grantee company to indemnity lands is not vested in the grantee, and remains in the United States until the lands are selected and the selection is approved by the Secretary of the Interior.

Wisconsin Central Railroad Company *vs.* Price County, 133 U. S., p. 496;

U. S. *vs.* Missouri, Kansas and Texas Railway, 141 U. S., 358.

There is another rule of law relating to indemnity land selections which is not mentioned in the brief of the appellant which is of the first importance in the consideration of the questions at issue in this case.

If the government held the legal title to these lands at the time the selection was presented, that title certainly passed to the grantee by the approval of the selection by the Secretary of the Interior on April 10, 1896, and had relation to the date of the grant, so as to cut off all inter-

vening rights or claims, and the present claim of the government to this money grows out of the wrongful acts of third parties, which the government permitted to be committed. If the trespass had not been committed the iron ore and limestone would still form part of the soil, and the government ought not to profit by the wrongful acts and negligence of its officers, and the spoliation of these lands by lawless men, in the face of its grant and contract with the State of Alabama, by which Congress granted these lands to the State without any exception being made in the grant of lands containing iron ore, limestone, or any other mineral. This grant was made prior to the enactment of the mining laws of July 26, 1866 (14 Statutes, p. 253), and contained no exception of mineral lands, such as was embraced in the later grants to aid in the construction of railroads, and that class of lands, therefore, passed under this grant.

The approval of the selections by the Secretary of the Interior had relation to the date of the grant, or at least to the date when the legal claim was asserted to them by their selection by the agent of the State.

The doctrine of relation whereby when a title is acquired it is held to relate back to a prior period, "for the purposes of justice," is well settled; as said by this court in the case of Gibson *vs.* Chouteau: "So far as it is necessary "to protect the rights of the claimant to the land, and the "rights of parties deriving their interests from him."

13 Wallace, p. 100;
Ross *vs.* Barland, 1 Peters, p. 655;
Landes *vs.* Brant, 10 Howard, p. 348;
Lessee of French *vs.* Spencer, 21 *ibid.*, pp. 228, 240;
Grisar *vs.* McDowell, 6 Wallace, p. 363;
Beard *vs.* Federy, 3 *ibid.*, p. 478;
Lynch *vs.* Bernal, 9 *ibid.*, p. 315;

Stark *vs.* Starrs, 6 *ibid.*, p. 402;
Shipley *vs.* Cowan, 91 U. S., p. 330;
Heath *vs.* Ross, 12 Johns., p. 140;
Musser *vs.* McRea, 44 Minnesota, p. 343.

If the government held the legal title to these lands after the legal application to select them was made by the agent of the State on December 30, 1887, and until that selection was approved by the Secretary of the Interior on April 10, 1896, *it held that title in trust for the benefit of the beneficial owners of the land* under the grant to the State of Alabama, and it was its duty to protect them from spoliation by the trespassers, for the lawful claim which had then been made for them was afterwards fully sustained by the Commissioner of the General Land Office and the Secretary of the Interior.

The law is well settled that the trustee's position in such a case is that of agent for the grantor and his privies in estate, as well as for the *cestui que trust*, and in carrying out his trust he must avoid all partiality toward either side.

Graham *vs.* King, 50 Mo., 22;
Bales *vs.* Perry, 51 Mo., 449;
Sherwood *vs.* Saxton, 63 Mo., 78;
Meacham *vs.* Steele, 93 Ill., 135;
Little Rock, etc., Railroad *vs.* Huntington, 120 U. S., 160;
Adams *vs.* Cowen, 177 U. S., 471, 484.

A trustee cannot claim the trust property adversely to those for whom he acquired and for whom he holds it.

Union Pacific Railroad Co. *vs.* Durant, 95 U. S., 576.

A trustee cannot lawfully acquire trust property, either by purchase or exchange.

Wormley *vs.* Wormley, 8 Wheat., 421.

Generally, for an abuse of his powers, or a neglect to exercise proper diligence, the trustee is personally liable in damages to the party injured.

Murrell *vs.* Scott, 51 Texas, 520;
Sherwood *vs.* Saxton, 63 Mo., 78.

The Court of Claims in its judgment in this case found as a matter of fact established by the testimony presented that the official adjustment of this land grant made by the Land Department shows that there was a deficiency of lands in the six-mile or granted limits of this railroad necessary to satisfy the grant of 523,244.87 acres, and that 237,584.05 acres of this deficiency was supplied from the fifteen-mile or indemnity limits of the grant, *and that there is now a deficiency of vacant lands necessary to satisfy the grant in full of 285,660.82 acres, and this deficiency has existed since the grant become effective by the definite location of the line or route of the said railroad.* (XIX, Finding of Facts. Record, pp. 10, 11.)

It is claimed by the appellees that owing to the great deficiency of lands required to satisfy this grant, which deficiency existed from the time when the road was definitely located, in both the granted and the indemnity limits thereof, the lands which were trespassed on, and are thereby involved in this action, were legally appropriated from and after the definite location of the railroad, in 1858, for the use and benefit of the State of Alabama and its grantees, as decided by this court on a like state of facts in the case of St. Paul and Pacific Railroad Company *vs.* Northern Pacific Railroad Company, in which case the court said:

"As to the objection that no evidence was produced of "any selection by the Secretary of the Interior from the "indemnity lands to make up for the deficiencies found in "the lands within the place limits, it is sufficient to observe "that all the lands within the indemnity limits only made

"up in part for those deficiencies. There was, therefore, "no occasion for the exercise of judgment of the Secretary "in selecting them, for they were all appropriated."

139 U. S., pp. 1, 19.

Under this decision the lands which are involved in this action were legally appropriated for the benefit of the State of Alabama and its grantees at and before the time when the trespass was committed upon them, and the grantees had then a beneficial interest in them aside from the rights acquired by the selection of them and the adjudication by the Commissioner of the General Land Office that the selection was lawful, and the approval of said selection by the Secretary of the Interior.

The approval of the selection by the Secretary of the Interior under these conditions operated, it would appear, in the manner defined by this court in the case of Langdeau *vs.* Hanes, in which it was said:

"In the legislation of Congress a patent has a double "operation. It is a conveyance by the government when "the government has any interest to convey, but when "issued upon confirmation of a previously existing title it "is documentary evidence, having the dignity of a record, "of the existence of that title, or of such equities respect- "ing the claim as justify its recognition and confirmation."

21 Wallace, p. 529.

The suits by the United States against the trespassers which resulted in the compromise under which the trespassers paid to the United States the money which is involved in this action were brought in trover for the conversion of the iron ore and limestone which had been taken from the land, *on February 8, 1897, several months after the certification of the land, and at a time when the legal title to it was unquestionably vested in the grantee and its assigns.* (Record, p. 10.)

The United States had no property interest in the land at the time the suits were commenced, for it had previously conveyed away its title.

It had no interest in the iron and limestone which had been unlawfully taken from the land, because it had contracted and agreed with the State of Alabama by the Act of June 3, 1856, to convey the land, and the iron and limestone which formed part of it, to the State of Alabama and its grantees, if the conditions annexed to the grant were performed, and those conditions were all performed by the construction of the railroad within the time required by law.

Having no beneficial interest in the land at the time of the trespass, and no title and ownership to the land and the ore and limestone granted as part of it, and wrongfully taken from it, at the time the suits were commenced, the United States had no right to commence or maintain those actions unless it sued for the benefit of the owner.

It is only the actual owner of the converted property, or one who is in possession of it, and will be liable ultimately to the true owner for its value, who can maintain an action for its conversion.

Opinion of Lawrence, *J.*, in Webb *vs.* Fox, 7 T. R., 395;
Blackstone's Com., 389;
1 Chit. Pl., 16 Am. Ed., 167;
Cooper *vs.* Chitty, 1 Burr., 20;
Hunt *vs.* Holton, 13 Pick., Mass., 216;
American and Eng. Encyclopedia of Law, 1 Ed., Vol. 26, pp. 746, 747, 748, and cases there cited.

If these suits had been defended by the trespassers it is reasonable to presume, on this state of the law, that they could not have been maintained unless it had been shown

that the United States sued for the use and benefit of the grantee of the State of Alabama, to whom it was liable for allowing the trespass to be committed on the land.

In the case of Schulenberg *vs.* Harriman, in an opinion of this court delivered by the distinguished and lamented Justice Field, whose learning in the law of land titles will stand forever as a monument to his memory, it was said with reference to a trespass committed on granted land of like character to the grant under consideration:

"Whilst the timber was standing it constituted a part "of the realty; being severed from the soil its character "was changed; it become personalty, but the title was "not affected; it continued as previously the property of "the owner of the land, and could be pursued wherever it "was carried. All remedies were open to the owner which "the law affords in other cases of the wrongful removal or "conversion of personal property."

21 Wallace, pp. 44, 64.

In conclusion, it is respectfully submitted that the record conclusively shows that at the time of the grant, and at all times subsequent thereto, until after the land was selected by the agent of the State of Alabama, the converted property *was a part of the land.* The wrongful act of the local land officers in rejecting the legal selection of it by the agent of the State, and the long delay of the officers of the government in approving the selection and issuing the certified list, should not be allowed to defeat the substantial rights of the grantees of the State to acquire all that was covered by the grant and all that was covered by the selection; nor should the government profit by the delay of its officers prejudicial to the rights of the claimants; nor should the government retain a benefit which it never could have claimed *but for the wrong of the persons converting the property.* But for the trespass, the iron ore and lime rock would have remained a part of the land,

and the grantees of the State would now be its owner. That trespassers converted it, cannot, according to the terms of the grant and law of Congress, be the means of depriving the grantees of the State of that which they ought to have under the plain terms of the grant, nor of conferring a benefit on the United States which they would not otherwise have. The government should not profit by a wrong.

The government cannot lawfully take private property for public uses without due compensation, and the iron ore and limestone taken from this land was private property because it was granted to the State of Alabama as part of the land.

United States *vs.* Great Falls Mfg. Company, 112 U. S., p. 656.

The United States having in its custody fifteen thousand dollars rightfully belonging to the appellees, judgment should be rendered in their favor.

Gains *vs.* Miller, 111 U. S., 395;
Swift *vs.* United States, 111 U. S., 23.

Respectfully submitted.

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